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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. [redacted] 134

GEORGE F. COLLINS, JR., *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GARRETT LOGAN
DONALD P. MOYERS
WILLIAM A. GOFFE

920 National Bank of Tulsa Bldg.
Tulsa, Oklahoma 74103

Attorneys for Petitioner.

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Petitioner, George F. Collins, Jr. (hereinafter "Collins"), prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit in the above-entitled case entered on January 2, 1968, petition for rehearing denied March 7, 1968.

OPINIONS BELOW

The opinions and orders below are as follows:

The January 2, 1968, opinion of the United States Court of Appeals for the Tenth Circuit (hereinafter "Tenth Cir-

cuit") on review of a decision of the Tax Court of the United States (Appendix A, *infra*) reported in 388 F. 2d (Advance Sheets) 353, and

The March 7, 1968 order of the Tenth Circuit denying a petition for rehearing of the January 2, 1968 opinion (Appendix B, *infra*) not reported, and

The June 30, 1966 Opinion of the Tax Court of the United States, Docket No. 2871-65, *George F. Collins, Jr., Petitioner, v. Commissioner of Internal Revenue, Respondent*, 46 T.C. No. 43, (Appendix C, *infra*), reported in 46 T.C. 461.

JURISDICTION

The Tenth Circuit entered its judgment on January 2, 1968. Rehearing was denied Mar. 7, 1968. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Under Oklahoma statutes and decisions, does a wife, in an action for divorce, have vested rights in or co-ownership of property acquired jointly during the marriage?

Does the division between husband and wife of jointly acquired property on or in connection with divorce, considering Oklahoma law, constitute a taxable event or transaction?

Is the decision of this case controlled by *U. S. v. Davis*, 370 U.S. 65 (Delaware statute) or *Pulliam v. C.I.R.*, 10 Cir., 329 F. 2d 97 (Colorado statute)?

STATUTES INVOLVED

12 Okla. Stat. Ann., Sec. 1278:

"When a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be restored to her maiden name if she so desires, and also to all the property, lands, tenements, hereditaments owned by her before marriage or acquired by her in her own right after such marriage, and not previously disposed of, and shall be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, having due regard to the value of his real and personal estate at the time of said divorce; which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in installments, as the court may deem just and equitable. As to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof. In case of a finding by the court, that such divorce should be granted on account of the fault or aggression of the wife, the court may set apart to the husband and for the support of the children, issue of the marriage, such portion of the wife's separate estate as may be proper. R.L. 1910, § 4969."

Internal Revenue Code of 1954, Sections 1001, 1002:

"SEC. 1001. DETERMINATION OF AMOUNT OF AND RECOGNITION OF GAIN OR LOSS.

"(a) Computation of Gain or Loss.—The gain from

the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

"(b) Amount Realized.—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. In determining the amount realized——

(1) there shall not be taken into account any amount received as reimbursement for real property taxes which are treated under section 164(d) as imposed on the purchaser, and

(2) there shall be taken into account amounts representing real property taxes which are treated under section 164 (d) as imposed on the taxpayer if such taxes are to be paid by the purchaser.

"(c) Recognition of Gain or Loss.—In the case of a sale or exchange of property, the extent to which the gain or loss determined under this section shall be recognized for purposes of this subtitle shall be determined under section 1002.

"(d) Installment Sales.—Nothing in this section shall be construed to prevent (in the case of property sold under contract providing for payment in installments) the taxation of that portion of any installment payment representing gain or profit in the year in which such payment is received.

"SEC. 1002. RECOGNITION OF GAIN OR LOSS.

"Except as otherwise provided in this subtitle, on the sale or exchange of property the entire amount of the

gain or loss, determined under section 1001, shall be recognized."

STATEMENT OF THE CASE

Respondent determined a deficiency in Petitioner's income tax for the calendar year 1959 in the amount of $220,046.20. Petitioner brought suit in The Tax Court of the United States. The Tax Court redetermined the deficiency to be $128,006.20. Petitioner then petitioned the Tenth Circuit for review. That Court affirmed.

At all material times Collins was and still is a resident of Oklahoma.

Jurisdiction of The Tax Court is conferred by 26 U.S.C., Sec. 7442, Jurisdiction of The Tenth Circuit is conferred by 26 U.S.C. Sec. 7482 and 28 U.S.C. Sec. 1254.

The issue is whether the transfer of corporate stock by Petitioner to his wife pursuant to a property settlement incident to a divorce granted under Oklahoma law was, for federal income tax purposes, a disposition of property and a taxable transaction, or a non-taxable division of property jointly acquired during marriage.

At and before the divorce, both Petitioner and his wife were Oklahoma residents.

Collins married Beverley R. Lorton in 1942. At that time she possessed assets not in excess of $10,000. She had one son by a prior marriage. Three children were born to the marriage of Collins and Beverley. During the marriage Collins was the controlling stockholder and chief executive officer of Liberty Glass Company, a corporation. During

the marriage Beverley, by means of her attendance at business conventions and frequent entertainment of customers in the home, conducted herself in such a manner as to assist Collins in his business efforts.

On April 20, 1959 Collins and Beverley decided that they could no longer continue their marriage relationship. They entered into an agreement to settle their respective property rights, provide for the custody of their children and provide for the support and maintenance of Beverley and their children.

The agreement provided for Collins' support of Beverley by stating that Collins should pay Beverley $40,000 per year for ten years, $35,000 per year for the next ten years and $30,000 per year thereafter for life. Support for the three children of the marriage provided for $175 per month per child plus educational and extraordinary medical expenses.

The agreement provided with respect to a division of property, for a payment of cash, transfer by Collins to Beverley of 26,592 shares of common stock of Liberty Glass Company, all life insurance which Collins owned on the life of Beverley, a Country Club membership, and certain automobiles and furniture. Under this agreement Beverley was to transfer to Collins all life insurance owned by her on his life and all her common stock of Red Ball, Inc., an Oklahoma corporation.

On April 28, 1959 the District Court of Tulsa County, Oklahoma entered a Decree of Divorce in favor of Beverley in

which it found, among other things, that Beverley made valuable contributions to the marriage and to the success and growth of Collins' business enterprises, and approved the agreement. The transfers, including transfer to Beverley of the Liberty Glass Company stock, were made.

At the time of the marriage Petitioner owned 167 shares of Liberty Glass Company common stock. This ownership was enlarged in 1945 by inheritance of a substantial block of this stock from Collins' father. In 1951, a stock dividend was declared at the ratio of 160 for 1. At the time of the marriage in 1942 the book net worth of the common stock was $900,000. The company prospered under Petitioner's management and at the time of the divorce the common stock had a book net worth of $5,400,000.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit has decided an important question—a question of property rights—in a way in conflict with applicable Oklahoma law.

State law controls. *Second National Bank, Ex'r. v. U.S.*, 387 U.S. 456; Cf. *U.S. v. Davis*, 1962, 370 U.S. 65.

The focal point at issue is the nature of property rights of parties to a divorce action with respect to property jointly acquired during marriage.

Its character is "very similar in conception to the community property of community property states, [and] is regarded as being held by a species of common ownership", *Thompson v. Thompson*, 1918, 70 Okl. 207, 173 P. 1037. There may be a division of the property even if the divorce is not

granted, as the wife "has a vested interest in such property which she does not forfeit even though her course cannot be justified and she is entitled to her proper share of such property", *Davis v. Davis*, 1916, 61 Okl. 275, 161 P. 190. The efforts of the wife need not be outside the home for her contribution to be such as to cause property acquired during marriage to be jointly acquired, and enhancement in value of property brought into the marriage is classified as jointly acquired property. The need of the parties furnishes no criterion for the division. *Moyers* v. *Moyers*, Okla., 1962, 372 P. 2d 844.

"Although the quantity of the jointly acquired property to be awarded each party is discretionary with the trial court, the nature of the estate to be awarded is not a matter of judicial discretion", *Williams v. Williams*, Okla., 1967, 428 P. 2d 218.

Thus the wife's interest is absolute. We submit it is a vested interest within the general rule that an estate in property may be vested even if the amount the beneficiary or owner will receive depends upon a future event or determination. Instances are joint tenancies, certain remainders, and gifts or devises to a class. Oklahoma has ruled there may be a vested interest in a contingent remainder where the only contingency is the happening of the event on which the remainder is to take effect, *Moore* v. *McAlester*, Okla. 1967, 428 P. 2d 266. Cf. *Franklin v. Margay Oil Corp.*, Okl., 1944, 194 Okl. 519, 153 P. 2d 486.

Distribution of stock under an Oklahoma divorce decree is a division of jointly acquired property and is not a tax-

able transaction.*Lucille Swanson* v. *Wiseman*, Civil No. 8478, U.S.D.C., W.D. Okla., Feb. 23, 1961, 7 A.F.T.R. 2d 824, 61-1 U.S.T.C. 79, 633. Cf. *Cofield* v. *Koehler*, D.C., Kansas, 207 F. Supp. 73, opinion by Senior Circuit Judge Huxman.

The Oklahoma statute was derived from Kansas. *Vanderslice v. Vanderslice*, 1945, 195 Okla. 496, 159 P. 2d 560. Therefore, *Putnam v. Putnam*, 1919, 104 Kans. 47, 177 P. 838, is of persuasive force in construing the Oklahoma statute.

Some of the foregoing and other Oklahoma cases are discussed in the Tenth Circuit's opinion. One of them, *Jones v. Farris*, 1937, 69 P. 2d 344, holds the wife's interest in jointly acquired property is not vested in the sense that her children inherit that interest if the wife predeceases her husband, who had the legal title, there being no divorce proceeding. The Court said "whatever rights were available to the wife to assert or resolve an interest in the jointly acquired property were never by her exercised * * *". Similarly to community property law was stated. We believe the case has no force here because no divorce action or disruption of the marriage occurred during the wife's lifetime.

Under the Oklahoma statute, jointly acquired property is to be divided "whether the title thereto be in either or both of said parties." As noted above, need is no criterion and fault does not destroy the right. At such time as the provisions of Section 1278 are invoked, the wife's right is absolute, and the only question for determination is how the property is to be divided. With all due respect, The Tenth Circuit failed to perceive the impact of Oklahoma law in regard to these matters.

The Tenth Circuit applied the doctrine of *U.S. v. Davis*, 370 U.S. 65, and *Pulliam v. C.I.R.*, 10 Cir., 329 F. 2d 97.

The *Davis* case construed a Delaware statute that "when a divorce be decreed for the aggression of the husband", "the complainant shall be * * * allowed, *out of her husband's real and personal estate*, such share as the courts think reasonable." (emphasis ours). And the Court said "Regardless of the tags, Delaware seems only to place a burden on the husband's property rather than to make the wife a part owner thereof. * * * but certainly this happenstance does not equate the transaction with a division of property by co-owners." We assert none of this can be said of Oklahoma law, which speaks of jointly acquired property, in whomever title may be, and recognizes a vesting and co-ownership which requires a division.

The *Pulliam* case concerns a Colorado statute which provides for alimony or a division of property. There is no provision as to jointly acquired property, and so the Colorado statute is not limited to a division of such property, as is Oklahoma's. The Tenth Circuit said (329 F. 2d 98): "* * * The only inchoate right of any consequence the wife has in Colorado is, if she survives her husband she may reject provisions he makes for her in his will and take instead one-half of his estate." In Oklahoma the wife possesses not only that right, but also the right to division of property jointly acquired during marriage when, marital discord occurs. We respectfully submit *Pulliam* is a far cry from the case at bar.

There is no requirement for identical tax treatment among the several states if the laws of those states create substantive differences, *U.S.* v. *Davis*, 370 U.S. 65, 71.

Inasmuch as state law controls, (*Second National Bank, Ex'r. v. U.S,. supra*, 387 U.S. 456) this Court should know that the Oklahoma law on the very issues here involved will doubtless be declared by The Supreme Court of Oklahoma in an appeal now being perfected by Collins from an order of The Oklahoma Tax Commission, which followed the Tenth Circuit's views in assessing Oklahoma income taxes against him.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

GARRETT LOGAN
DONALD P. MOYERS
WILLIAM A. GOFFE

920 National Bank of Tulsa Bldg.
Tulsa, Oklahoma 74103

Attorneys for Petitioner.